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No. 97-1966

In The

Supreme Court of the United States

October Term, 1997

DAVID BAXTER, individually, and the CITY OF MURFREESBORO,

Petitioners,

vs.

JOHN W. REED and HENRY SHARBER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The International Municipal Lawyers Association (IMLA) is an independent, nonprofit professional organization dedicated to serving the needs of local government attorneys and their governmental clients.[1] Since its establishment in 1935, IMLA has been an advocate for the rights and privileges of local governments and a valuable resource for the attorneys who represent them.

The prior decision of the United States Court of Appeals for the Sixth Circuit in *Baxter v. Reed*, 134 F.3d 351 (6th Cir. 1998), significantly erodes the attorney-client privilege previously afforded to governmental attorneys and their public clients. Society has a significant interest in permitting governmental attorneys to provide their clients with sound, confidential legal advice, and such advice has not been and should not be restricted only to governing bodies sitting in formal session. The daily operation of government requires governmental attorneys to frequently give legal advice to individual elected officials or individual administration officials, which would unjustifiably become discoverable to potential adversaries under the decision of the court of appeals. Curtailment or elimination of the privilege could only work to the substantial detriment of those for whom government works – the people. This Court should grant the Petition for Writ of Certiorari because the decision

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[1] The instant amicus curiae brief was prepared in whole by Fay D. Dupuis, City Solicitor for the City of Cincinnati, and Roshani D. Hardin, Assistant Solicitor. IMLA provided all necessary funds for preparation and submission of the amicus curiae brief.

below conflicts with this Court's prior rulings on the application of the attorney-client privilege, and specifically with this Court's ruling in *Upjohn Co. v. United States*, 499 U.S. 383, 101 S.Ct. 677 (1981).

SUMMARY OF THE ARGUMENT

The attorney-client privilege protects confidential communications made between a city attorney, essential administration officials and individual councilmembers where the councilmembers act as agents for the city council and where the communications focus on pending litigation against the municipal government. *Falcone v. International Revenue Service*, 479 F.Supp. 985 (E.D. Mich. 1979) (citing *Mead Data Central v. U.S. Dept. of Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977)).

The "control group" test, inappropriately applied by the Sixth Circuit in its decision, was rejected by this Court as being overly restrictive of the attorney-client privilege in the corporate setting. *Upjohn Co. v. United States*, 449 U.S. 383, 101 S. Ct. 677 (1981). Such a restrictive test disregards the purpose behind the privilege; namely, to protect advice given to those who can act on it and also to protect the giving of information to an attorney, permitting the attorney to provide sound and informed advice. *Id.* at 390.

Further, all communications by the parties at the meeting in question are protected by the attorney work product privilege which does apply to the work product of government lawyers and exists to protect the files and

mental impressions of an attorney as reflected in interviews, correspondence and countless other tangible and intangible ways. *United States v. One Tract of Real Property Together With All Buildings, Improvements, Appurtenances and Fixtures*, 95 F.3d 422 (6th Cir. 1996).

ARGUMENT

I. THE DECISION OF THE SIXTH CIRCUIT RAISES IMPORTANT QUESTIONS OF FEDERAL LAW AS IT NARROWS THE SCOPE OF THE ATTORNEY-CLIENT PRIVILEGE AS ESTABLISHED BY PRIOR RULINGS OF THIS COURT.

On December 16, 1992, the city attorney for the City of Murfreesboro, Tennessee, Thomas Reed, attended a meeting in the City Manager's Office with the city manager, the city fire chief and two of the city's elected councilmembers. The meeting focused on pending litigation involving disputed promotions in the fire department, and full and frank attorney-client discussions were held by the city representatives present. Respondents sought to obtain testimony from such city officials regarding the content of the December 16, 1992 meeting. The Sixth Circuit ruling ultimately resulted in the filing of the Petition for Writ of Certiorari in this matter.

In its ruling in *Baxter v. Reed*, 134 F.3d 351 (6th Cir. 1998), the Court of Appeals held that the testimony in issue was not subject to attorney-client privilege because the individual city councilmembers were not acting as clients of the city attorney during the December 16, 1992

meeting. Rather, the Sixth Circuit found that the individual councilmembers participated in the meeting as "third parties", thereafter ruling that the discussion was not held in confidence for purposes of the attorney-client privilege. Such a ruling is contrary to the prior decisions of the Sixth Circuit and this Court.

The attorney-client privilege is the oldest of the privileges for confidential communications known to common law. Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice. *Upjohn Co. v. United States*, 449 U.S. 383, 101 S. Ct. 677 (1981). As noted by this Court in *Upjohn Co., supra*, the "privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client. In *Trammel v. United States*, 445 U.S. 40, 51, 100 S.Ct. 906, 913 (1980), this Court emphasized that "[t]he lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." Most recently, in *Swidler & Berlin v. U.S.*, Supreme Court of the United States, No. 97-1192, this Court reiterated the historical and present significance of the privilege:

> The contention that the attorney is being required to disclose only what the client could have been required to disclose is at odds with the basis for the privilege even during the client's lifetime. In related cases, we have said that the loss of evidence admittedly caused by the privilege is justified in part by the fact that

> without the privilege, the client may not have made such communication in the first place.

Further, it is well settled that where the client is an organization, the prevailing rule is that the privilege extends to communications between attorneys and all agents or employees of the organization who are authorized to act or speak for the organization in relation to the subject matter of the communication. *Falcone v. Internal Revenue Service*, 479 F.Supp. 985 (E.D. Mich. 1979) (citing *Mead Data Central v. U.S. Dept. of Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977)). Likewise, other courts have held that "[i]t is fundamental that an entity, such as [a] town council, may be a client for purposes of the attorney-client privilege. . . . It is equally fundamental, however, that an entity can only act through natural persons." *Interfaith Housing Delaware, Inc. v. Town of Georgetown*, 841 F.Supp. 1393 (D. Del. 1994) (citing *Garner v. Wolfinbarger*, 430 F.2d 1093, 1101 (5th Cir. 1970)). In *Interfaith Housing Delaware, Inc.*, the court held that participation of individual councilmembers in consultation with the town solicitor did not waive attorney-client privilege with respect to documents related to municipal authority to impose development conditions, where individual councilmembers were agents of council and shared common interests with council regarding development. *Id.* at 1397. The court further noted that in order for the town council to obtain legal advice regarding proposed development conditions, "individual councilmembers must communicate with the Town Solicitor." *Id.* at 1398. Similarly, in the case at bar, the "joint obligations and commonality of interest" of the individual councilmembers created an agency relationship between such members and council as a whole,

thus preserving the attorney-client privilege in the contested matter before this Court. *Id.*

Likewise, the "commonality of interest" was cited as a factor in favor of the existence of the attorney-client privilege in the matter of *Federal Deposit Insurance Corp. v. Ernst & Whinney*, 137 F.R.D. 14 (E.D. Tenn. 1991). In that case, criminal reports and referrals sought by Defendant Ernst & Whinney had been prepared by the FDIC for use in consultation with its attorneys, but had also been provided to other state and federal bank regulatory agencies, which defendant argued had waived the attorney-client privilege for all such documents. *Id.* at 16. In ruling for the FDIC, the district court emphasized that production of the documents to other agencies was not done indiscriminately, but rather only to other agencies which had an absolute commonality of interest with the FDIC in dealing with potential criminal acts which occurred at the banks in question. *Id.* In doing so, the trial court specifically rejected the defendant's argument that the furnishing of the subject reports to other regulatory agencies so compromised the confidential nature of the reports as to revoke the attorney-client privilege.

In the case at bar, the Sixth Circuit declined to extend the attorney-client privilege to communications made at a meeting at which full and frank discussions took place between the city attorney, two individual councilmembers, the city manager and the city fire chief regarding pending litigation arising from disputed fire department promotional exams. The panel's opinion holds that the individual councilmembers were not clients at a meeting with their lawyer, but rather elected officials investigating executive behavior. *Baxter v. Reed*, 134 F.3d 351, 357

(6th Cir. 1998). However, the municipality's city council clearly had an interest in reviewing the potential legal liability arising from the pending litigation, and as agents of the governing body, the individual councilmembers possessed the authority to speak and act for the council in that regard. Accordingly, they were not present at the meeting as third parties as the lower court would suggest, and their attendance at the meeting did not destroy the confidential nature of the communications which took place.

As stated in *United States v. Pipkins*, 528 F.2d 559, 562 (5th Cir. 1976), the "[attorney-client] privilege protects the freedom of consultation between clients and attorneys by prohibiting disclosure of the substance of communications made in confidence between an attorney and a client." In the instant case, the individual councilmembers had a duty to their electorate to form independent judgments as to the recommended courses of action and potential legal liability faced by the municipal government. Such routine yet fundamental actions by elected officials would not be possible without the right of the elected officials to engage in full and frank consultation with legal counsel and the municipal employees directly involved in pending litigation.

Further, such a right to consultation would be meaningless if the looming threat of discovery precluded full disclosure by all parties present. Thus, the Sixth Circuit's decision in this case goes beyond even the prior Sixth Circuit ruling in *In re Grand Jury Subpoena (United States v. Doe)*, 886 F.2d 135 (6th Cir. 1989) (*citing In re Grand Jury Proceedings (Fine)*, 641 F.2d 199, 2103 (5th Cir. 1981)), which emphasized the policy considerations underlying

the attorney-client privilege, namely, to encourage clients to make full disclosure to their attorneys. The Sixth Circuit in *Doe* extended the attorney-client privilege to a city attorney who was found to represent both the City of Detroit as well as its city council, even where the council had retained separate outside counsel to address issues arising from the contested condemnation action. In that case, the Sixth Circuit noted that the council met with the city attorney to review terms of the consent judgment in question, a duty imposed on such elected officials, and therefore there was not a distinction between the positions advocated by the council and the administration.

Similarly, the city attorney in the case at bar provides legal advice to both the city manager and city council and provides individual councilmembers with advice on city matters. (Bratcher dep. at 12, R. 16, J.A. at 103.) He therefore has an established duty to report to council on legal proceedings involving the municipal government. Accordingly, the city attorney represented a single client at the meeting in question, namely, the City of Murfreesboro, which includes the city council and individual councilmembers, and all communications regarding pending litigation must be protected by the privilege.

In support of its position, the Sixth Circuit compared the facts herein to those present in *In Re Grand Jury Duces Tecum (Office of President v. Office of Independent Counsel)*, 112 F.3d 910 (8th Cir.), *cert. denied*, ___U.S. ___, 117 S. Ct. 2482 (1997). In that case, the court held that documents created at meetings between White House lawyers, the president's wife and her personal lawyers were not protected by the privilege because there was no common interest between the White House and the president's

wife, who was acting in her personal capacity and representing her personal interests. *Id.* at 933.

The instant case is clearly distinguishable from the facts in *Office of President, supra*, because an obvious common interest existed between the city representatives present at the December 16, 1992 meeting. As noted by the Eighth Circuit, the common interest requirement is a "loose standard" which may be established as being "either legal, factual or strategic in character." *Id.* at 922. Such a standard is clearly satisfied by the nature of the municipal meeting in question, wherein all parties were present in their official capacities as elected officials or administration officials whose common interest was to best serve the needs of the residents of Murfreesboro in light of the pending litigation. Accordingly, the attorney-client privilege protects all confidential communications made in such a context.

II. *BAXTER* RAISES IMPORTANT QUESTIONS OF FEDERAL LAW IN THE CONTEXT OF THE ATTORNEY-CLIENT PRIVILEGE WHICH SHOULD BE SETTLED BY THIS COURT.

In its decision, the Sixth Circuit placed great emphasis on the fact that "[t]here is no indication that the city council or individual councilmembers played any role in firefighter promotions." *Baxter v. Reed*, 134 F.3d 351, 357 (6th Cir. 1998). By its actions, the court appears to advocate the "control group" test under which the privilege does not apply to the extent that the communications were made by officers and agents not responsible for directing the organization's actions in response to

legal advice, a rationale which was firmly rejected by this Court in its reversal of the Sixth Circuit's decision in *Upjohn Co. v. United States*, 449 U.S. 383, 101 S. Ct. 677 (1981).

In *Upjohn, supra,* the Internal Revenue Service sought production of questionnaires created by counsel for Upjohn Co. to gather information about illegal foreign bribes which were the basis of pending litigation. Such questionnaires had been completed by all Upjohn managers outside the United States and such information disclosed was also discussed between counsel and numerous other company officers and employees. *Id.* at 387.

In rejecting the restrictive "control group" test, this Court asserted that such a view "overlooks the fact that the privilege exists to protect not only the giving of professional advice to those who can act on it, but also the giving of information to the lawyer to enable him to give sound and informed advice." *Id.* at 390. This Court noted that the attorney's advice to the client will frequently be more significant to noncontrol group members than to those who officially sanction the advice.

The *Upjohn* decision, *supra,* clearly extends the attorney-client privilege to similar consultations between city attorneys and city representatives. As stated by this Court, "[t]he first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant." *Id.* Further, the restrictive "control group" test "threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law. In light of the vast

and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, 'constantly go to lawyers to find out how to obey the law.' " *Id.* at 392 (citing *Burnham, The Attorney-Client Privilege in the Corporate Arena*, 24 Bus. Law, 901, 913 (1969)). Likewise, a municipal government, through its agents, must frequently turn to advice of counsel to guide it through an ever-growing maze of litigation. The Sixth Circuit's restrictive decision in this case would severely hamper counsel's ability to steer governmental clients on the proper path through such litigation, with the ultimate harm directed at the citizenry served by such governmental entities.

Additionally, such confidential communications by counsel to municipal representatives is not discoverable pursuant to the attorney work product privilege. *United States v. One Tract of Real Property Together With All Buildings, Improvements, Appurtenances and Fixtures*, 95 F.3d 422 (6th Cir. 1996). In *One Tract, supra*, the Sixth Circuit held that a district court did not abuse its discretion in a civil forfeiture case when it refused to compel the United States Attorney's Office to provide admissions requested by a landowner who sought to prove that the government obtained withdrawal from a prior plea agreement under false pretenses. *Id.* at 427. In that case, the Sixth Circuit specifically found that the privilege applies to the work product of government attorneys and that "the information sought through the admissions is protected by the attorney work product privilege. This privilege 'protects' the files and the mental impressions of an attorney . . . reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions,

personal beliefs, and countless other tangible and intangible ways [. . .] prepared in anticipation of litigation.' " *Id.* at 428-429 (citing *A. Michael's Piano, Inc. v. FTC*, 18 F.3d 138, 146 (2d Cir.1994)) (quoting *Hickman v. Taylor*, 329 U.S. 495, 67 S. Ct. 385 (1947)).

Thus, the attorney work product privilege clearly protects the confidential communications made at the December 16, 1992 meeting between the city attorney for Murfreesboro and the municipal agents and representatives. Although the city councilmembers may initially have been present to inquire into alleged irregularities in the promotion procedure, once the discussion turned to the pending litigation, all parties shared a "joint obligation and commonality of interest" to assist in preparation of an adequate defense. Thus any such attorney-client discussions which took place are protected by the attorney-client privilege.

As reiterated by this Court in *Upjohn, supra*, "if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some particular degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Id.* at 684. The practical effect of the panel's opinion is that government attorneys within the jurisdiction of the Sixth Circuit Court of Appeals will be reduced to relying on such an "uncertain privilege" as they attempt to advise their municipal clients and the clients' representatives and agents. Thus it appears that the Sixth Circuit Court of Appeals did not contemplate the potential harm of their restrictive ruling which decrees that a

city attorney will not be able to speak in confidence to an elected councilmember about municipal matters unless the entire council is in session. Such a ruling should not be permitted to become controlling law.

CONCLUSION

The communications made by the city attorney to individual councilmembers and administration representatives at the December 16, 1992 meeting were made to agents of the client, the City of Murfreesboro, and on behalf of the client. Such communications are clearly protected by both the attorney-client privilege and the attorney work product doctrine.

Accordingly, *Amicus Curiae* IMLA would respectfully request that the Petition for Writ of Certiorari be granted, due to the significance of the issues presented herein and in order to bring the opinion below into conformity with this Court's prior decisions.

Respectfully submitted,

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